

LEONELA ARACELY VALDEZ
HERRERA,

Plaintiff,

v.

FIRST NATIONAL BANK OF
OMAHA, N.A.,

Defendant.

Currently before the Court is Plaintiff Leonela Aracely Valdez Herrera's ("Plaintiff") Motion for Partial Summary Judgment ("Motion") [23]. Having reviewed all papers submitted pertaining to this Motion, the Court **NOW FINDS AND RULES AS FOLLOWS:** the Court **DENIES** Plaintiff's Motion.

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1 I. BACKGROUND

2 A. Factual Background

3 On March 6, 2015, Plaintiff opened a credit card
4 account with Defendant. Decl. of Pl. ("Pl. Decl.")
5 ¶ 2, ECF No. 23-3. As part of her application for the
6 credit card account, Plaintiff provided her cellphone
7 number as a primary contact number. Id. ¶ 3.

8 In 2016, Plaintiff became unable to make scheduled
9 payments on her credit card account. Id. ¶ 5.
10 Defendant, therefore, began placing collection calls to
11 Plaintiff's cellphone to collect past-due payments.
12 Id. ¶ 6. In addition to manually placing calls,
13 Defendant utilizes the Avaya Proactive Contact 5.1
14 computer dialing system ("Avaya system") to place
15 collection calls. Mot. for Summ. J. ("Mot."), Ex. F
16 ("Mayo Dep.") 8:16-24, ECF No. 23. Each day, Defendant
17 runs a sweep of its accounts to identify delinquent
18 accounts. Id. at 10:6-10. Defendant then loads the
19 numbers associated with these accounts into the Avaya
20 system, which places calls to the delinquent account
21 holders. Id. at 11:17-21. After the Avaya system
22 dials the number, the call is transferred to an agent.
23 Id. at 22:21-24.

24 On January 4, 2017, Defendant placed a collection
25 call to Plaintiff's cellphone. Id., Ex. E at 4. The
26 full transcript of the call is as follows:

27 Agent: "Hello?"
28 Plaintiff: "Hello?"
Agent: "Hi, this is Jodi with First National

1 Bank of Omaha on a recorded line. I'd
2 Plaintiff: like to speak with Leonela Valdez?"
"Stop calling me."

3 Id., Ex. G. Following the termination of the call,
4 Defendant's collection agent typed a note into
5 Defendant's collection system, which stated, "Gal
6 answered and s[ai]d stop calling me then she
7 h[ung]/u[p]." Id., Ex. E at 4. Defendant continued to
8 place a total of forty-two calls to Plaintiff's
9 cellphone between January 5, 2017 and February 3, 2017.
10 See id. at 4-5; Compl. ¶ 19, ECF No. 1.

11 **B. Procedural Background**

12 Plaintiff filed her Complaint against Defendant on
13 February 13, 2017 alleging violations of the Telephone
14 Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, and
15 the Rosenthal Fair Debt Collection Practices Act
16 ("RFDCPA"), Cal. Civ. Code § 1788. See Compl.

17 Plaintiff filed the instant Motion [23] on October
18 31, 2017. On November 13, 2017, Defendant filed its
19 Opposition [29] to Plaintiff's Motion. In its
20 Opposition, Defendant also sought summary judgment on
21 both of Plaintiff's claims. See Def.'s Opp'n to Pl.'s
22 Mot. for Summ. J. ("Opp'n") 11:3-7, 11:18-19, ECF No.
23 29. Plaintiff filed her Reply [32] on November 20,
24 2017.

25 **II. DISCUSSION**

26 **A. Legal Standard**

27 1. Summary Judgment

28 Federal Rule of Civil Procedure 56 states that a

1 "court shall grant summary judgment" when the movant
2 "shows that there is no genuine dispute as to any
3 material fact and the movant is entitled to judgment as
4 a matter of law." Fed. R. Civ. P. 56(a). A fact is
5 "material" for purposes of summary judgment if it might
6 affect the outcome of the suit, and a "genuine issue"
7 exists if the evidence is such that a reasonable fact-
8 finder could return a verdict for the non-moving party.
9 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
10 (1986). The evidence, and any inferences based on
11 underlying facts, must be viewed in the light most
12 favorable to the opposing party. Twentieth Century-Fox
13 Film Corp. v. MCA, Inc., 715 F.2d 1327, 1329 (9th Cir.
14 1983). In ruling on a motion for summary judgment, the
15 court's function is not to weigh the evidence, but only
16 to determine if a genuine issue of material fact
17 exists. Anderson, 477 U.S. at 255.

18 Under Rule 56, the party moving for summary
19 judgment has the initial burden to show "no genuine
20 dispute as to any material fact." Fed. R. Civ. P.
21 56(a); see Nissan Fire & Marine Ins. Co. v. Fritz Cos.,
22 210 F.3d 1099, 1102-03 (9th Cir. 2000). The burden
23 then shifts to the non-moving party to produce
24 admissible evidence showing a triable issue of fact.
25 Nissan Fire & Marine Ins., 210 F.3d at 1102-03; see
26 Fed. R. Civ. P. 56(a). Summary judgment "is
27 appropriate when the plaintiff fails to make a showing
28 sufficient to establish the existence of an element

1 essential to [her] case, and on which [she] will bear
2 the burden of proof at trial." Cleveland v. Policy
3 Mgmt. Sys. Corp., 526 U.S. 795, 805-06 (1999); see
4 Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

5 The standard for a motion for summary judgment
6 "provides that the mere existence of *some* alleged
7 factual dispute between the parties will not defeat an
8 otherwise properly supported motion for summary
9 judgment; the requirement is that there be no *genuine*
10 issues of *material* fact." Anderson, 477 U.S. at 247-
11 48.

12 2. Partial Summary Judgment

13 Federal Rule of Civil Procedure 56(g) authorizes
14 courts to grant partial summary judgment to limit the
15 issues to be tried in a case. State Farm Fire & Cas.
16 Co. v. Geary, 699 F. Supp. 756, 759 (N.D. Cal. 1987)
17 (citing Lies v. Farrell Lines, Inc., 641 F.2d 765, 769
18 n.3 (9th Cir. 1981)). Absent a specific statute
19 authorizing otherwise, a partial summary judgment under
20 Rule 56(g) is not a final judgment but rather an
21 interlocutory summary adjudication or a pre-trial
22 order, neither of which is appealable prior to the
23 entry of a final judgment in the case. Wynn v.
24 Reconstruction Fin. Corp., 212 F.2d 953, 956 (9th Cir.
25 1954).

26 B. Discussion

27 In its Opposition to Plaintiff's Motion, Defendant
28 also requests the Court grant summary judgment in its

1 favor on both of Plaintiff's causes of action. Opp'n
2 11:4-7, 11:18-19. Defendant at no point requested a
3 hearing date for its "motion." Defendant filed its
4 Opposition, which includes the request for the Court to
5 enter summary judgment in its favor, on November 13,
6 2017. The Court previously set the motion filing cut-
7 off for October 31, 2017. See Order re Stip. to
8 Continue, ECF No. 22. Therefore, no matter what form
9 Defendant's request for summary judgment takes,
10 Defendant filed its "motion" fourteen days after the
11 filing deadline.

12 Courts in this circuit have held that "[i]t is not
13 an abuse of discretion for a court to deny or strike a
14 motion on the basis that it is untimely filed according
15 to the timetable set by the scheduling order." Dayton
16 Valley Inv'rs, Ltd. Liab. Co. v. Union Pac. R.R., 664
17 F. Supp. 2d 1174, 1178 (D. Nev. 2009)(citing Johnson v.
18 Mammoth Recreations, Inc., 975 F.2d 604, 610 (9th Cir.
19 1992)); see C.D. Cal. R. 7-12 ("The Court may decline
20 to consider any memorandum or other document not filed
21 within the deadline set by order or local rule.").
22 Accordingly, because Defendant's "motion" was filed two
23 weeks after the motion filing cut-off date, the
24 "motion" is untimely, and the Court will not consider
25 Defendant's request for the Court to enter summary
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1 judgment in its favor.¹

2 The Court now turns to the merits of Plaintiff's
3 Motion. Plaintiff seeks partial summary judgment on
4 her TCPA claim. The TCPA states,

5 It shall be unlawful for any person within the
6 United States . . . to make any call (other than
7 a call made for emergency purposes or made with
8 the prior express consent of the called party)
9 using any automatic telephone dialing system or
10 an artificial or prerecorded voice . . . to any
11 telephone number assigned to a . . . cellular
12 telephone service
13 47 U.S.C. § 227(b)(1)(A)(iii). To prove that Defendant

14 violated the TCPA, Plaintiff must establish that
15 (1) Defendant called her cellphone (2) using an ATDS.
16 See Levy v. Receivables Performance Mgmt., LLC, 972 F.
17 Supp. 2d 409, 417 (E.D.N.Y. 2013). The parties do not
18 dispute these two elements are met, and therefore,
19 Plaintiff has proven her prima facie case under the
20 TCPA.

21 The Court need only assess whether Defendant had
22 Plaintiff's express consent to call Plaintiff.
23 "Express consent is not an element of a plaintiff's
24 prima facie case but is an affirmative defense for
25 which the defendant bears the burden of proof." Van
26 Patten v. Vertical Fitness Grp., Ltd. Liab. Co., 847
27 F.3d 1037, 1044 (9th Cir. 2017). The Federal
28 Communications Commission ("FCC") has made clear that

26 ¹ Even assuming the Court considered Defendant's improper
27 "motion," there exists a genuine issue of material fact as to
28 whether Plaintiff clearly and expressly revoked her consent to be
called, and therefore, the Court **DENIES** Defendant's "motion" on
its merits.

1 consumers expressly consent to be contacted when they
2 provide their cellphone numbers as part of a credit
3 application. See In re Rules Implementing the Tel.
4 Consumer Prot. Act of 1991, 23 FCC Rcd. 559, 564 (Dec.
5 28, 2007)("We conclude that the provision of a cell
6 phone number to a creditor, e.g., as part of a credit
7 application, reasonably evidences prior express consent
8 by the cell phone subscriber to be contacted at that
9 number regarding the debt.").

10 Plaintiff does not dispute that she gave her
11 express consent for Defendant to call her when she
12 signed up for the credit card account with Defendant.
13 Mot. 11:22-25. Rather, Plaintiff contends that she
14 expressly revoked her consent in the January 4, 2017
15 call with Defendant's representative and any calls she
16 received thereafter were in violation of the TCPA. Id.
17 at 12:2-3.

18 "The TCPA does not explicitly grant consumers the
19 right to revoke their prior express consent." Van
20 Patten, 847 F.3d at 1047 (internal citations omitted).
21 In 2015, however, the FCC clarified that consumers may
22 revoke their "consent in any reasonable manner that
23 clearly expresses [their] desire not to receive further
24 calls." In re Rules & Regulations Implementing the
25 Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. 7961, 7999
26 (July 10, 2015); see Van Patten, 847 F.3d at 1048.
27 Courts do not consider the called party's subjective
28 intent, and instead, "consent is terminated when the

1 [person who obtained consent] knows or has reason to
2 know that the other is no longer willing for him to
3 continue the particular conduct." Dixon v. Monterey
4 Fin. Servs., No. 15-cv-03298-MMC, 2016 U.S. Dist. LEXIS
5 82601, at *8 (N.D. Cal. June 24, 2016)(quoting Osorio
6 v. State Farm Bank, F.S.B., 746 F.3d 1242, 1253 (11th
7 Cir. 2014)).

8 Here, Plaintiff asserts that she clearly revoked
9 her consent to be called when she stated "stop calling
10 me" in the January 4, 2017 call. Mot. 12:6-8.
11 Defendant's representative's notes from immediately
12 after the call reference this statement. Id., Ex. E at
13 4. Defendant contends in the Declaration of Paul
14 Osborne that a minor had previously answered
15 Plaintiff's phone, and therefore, Defendant was not
16 clear on whether Plaintiff herself had actually
17 requested that Defendant stop calling her. Decl. of
18 Paul Osborne ¶ 13, ECF No. 29-1. While Plaintiff
19 argues that Defendant has not produced any evidence to
20 support its assertion that a minor previously answered
21 Plaintiff's phone, "the court must examine the evidence
22 in the light most favorable to the non-movant and draw
23 all justifiable inferences in its favor." Anderson,
24 477 U.S. at 248.

25 Importantly, "a factual dispute regarding alleged
26 revocation of consent cannot be properly resolved on
27 summary judgment." Walker v. Transworld Sys., No.
28 8:14-cv-588-T-30MAP, 2014 U.S. Dist. LEXIS 174136, at

1 *7 (M.D. Fla. Dec. 17, 2014); see Osorio, 746 F.3d at
2 1256 (finding that whether the plaintiff revoked his
3 consent was "exactly the kind of factual dispute that
4 cannot properly be resolved on summary judgment").
5 While Plaintiff stated in the January 4, 2017 call,
6 "stop calling me," these were the only words other than
7 "hello" that Plaintiff stated in the entire call. See
8 Mot., Ex. G. Plaintiff then did not answer another one
9 of Defendant's calls and never again asserted any
10 desire not to be called regarding her credit card
11 account. Whether Plaintiff's request to "stop calling"
12 was a clear and express revocation of her consent to be
13 called is a question of fact reserved for the jury.
14 See Bally v. First Nat'l Bank of Omaha, No. 17-10632,
15 2017 U.S. Dist. LEXIS 177286, at *4 (E.D. Mich. Oct.
16 26, 2017)(denying summary judgment motion because
17 "[r]easonable minds could differ regarding whether [the
18 p]laintiff clearly expressed his desire not to receive
19 further calls from [the d]efendant"); Ruffrano v. HSBC
20 Fin. Corp., No. 15CV958A, 2017 U.S. Dist. LEXIS 132674,
21 at *49 (W.D.N.Y. Aug. 17, 2017)(noting that the FCC
22 analyzes revocation as a totality of circumstances, a
23 standard that "calls for fact finding not appropriate
24 in a summary judgment motion").

25 Because there remains a genuine issue of material
26 fact as to whether Plaintiff clearly and expressly
27 revoked her consent to be called, the Court **DENIES**
28 Plaintiff's Motion.

1 **III. CONCLUSION**

2 Based on the foregoing, the Court **DENIES**
3 Plaintiff's Motion [23].

4 **IT IS SO ORDERED.**

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6 DATED: December 4, 2017

s/ RONALD S.W. LEW

7 **HONORABLE RONALD S.W. LEW**
8 Senior U.S. District Judge
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